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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RON SHACKELFORD et al.,

Plaintiffs and Appellants,

v.

VALLEY SOIL AND FOREST PRODUCTS et al.,

Defendants and Respondents.

F078046

(Super. Ct. No. 18CECG00360)

# OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Mark W. Snauffer, Judge.

Asvar Law, Christopher A. Asvar and Jonathan J. Perez for Plaintiffs and Appellants.

Weakley & Arendt, James D. Weakley and Ashley N. Reyes for Defendant and Respondent County of Fresno.

No appearance for Defendants and Respondents Valley Soil and Forest Products, Steve Soria, Richard Ward Oh, and Nathan Zyle Finnell.

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Appellants Ron Shackelford, Ruth Shackelford, Kristi Shafer, and Sherry Guadarrama (collectively, "appellants") are the alleged successors-in-interest of three individual passengers ("decedents") who died in a tragic motor vehicle collision on February 2, 2016. Appellants assert that respondent County of Fresno ("County" or "respondent") bears some liability for the collision due to allegedly dangerous conditions of the roadway where the collision occurred. Appellants petitioned the superior court for relief from a statute requiring the timely presentation of government tort claims to County. (See Gov. Code, § 945.4.)[1] The trial court denied appellants' petition for relief.

Appellants contend on appeal that their claims against County did not accrue until the conclusion of criminal proceedings against the driver. If accrual was delayed as appellants argue, then their filings with County would have been timely. However, we conclude that appellants failed to adduce competent evidence establishing the factual predicates of their delayed accrual claim. As a result, there is "a complete lack of relevant and competent evidence" (*Rodriguez v. County of Los Angeles* (1985) 171 Cal.App.3d 171, 176) to support appellants' claim for relief from the claims presentation requirement. We affirm the trial court's order denying appellants' petition for relief.

## FACTS

A major motor vehicle collision occurred in Fresno County on February 2, 2016. Rhonda Shackelford, Justin Vanmeter, and Serena Guadarrama perished in the collision, and plaintiff Ronnie Cruz suffered a severe brain injury.[2] Appellants allege that the collision was caused, at least in part, by County's negligence with respect to the design, control, and maintenance of the intersection.[3]

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1 Future statutory references are to the Government Code unless otherwise noted.

2 Plaintiff Ronnie Cruz is not an appellant in the present appeal. The trial court granted the petition as to him.

3 In full, appellants alleged "County negligently, improperly, unreasonably or in some other actionable manner owned, operated, controlled, designed, planned,

On appeal, appellants claim that in the days following the collision, they consulted with several attorneys who each told them they could only pursue workers compensation death benefits. Appellants further assert that the California Highway Patrol (CHP) released a supplemental report concerning the collision on July 15, 2016. The report allegedly concluded Nathan Finnell violated the Vehicle Code. The report also apparently concluded the traffic controls at the intersection were in good condition.

Appellants say they consulted with current counsel, Asvar Law, P.C., in "early 2018." Appellants filed claims for damages with County on February 1, 2018. County responded with a letter dated February 12, 2018, stating County was not taking action on the claims because they were not presented within six months after the event. The letter further stated that appellants' "only recourse at this time is to apply without delay to the Fresno County Board of Supervisors for leave to present a late claim."

On February 27, 2018, appellants filed applications with the Fresno County Board of Supervisors seeking leave to present a late claim. County effectively denied the applications.[4]

On April 13, 2018, appellants petitioned the trial court for relief from the statutory claims presentation requirement. The petition alleged that decedents Rhonda

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engineered, maintained, inspected, repaired, modified, changed and/or failed to make the roadway and intersection safe, where the accident occurred, so as to cause the motor vehicle accident."

The petition references a complaint appellants apparently filed against County. Elsewhere, the record indicates a complaint was filed February 9, 2018. The complaint is not included in the record.

[4] Appellants' petition alleges County did not respond to the applications, which would constitute a denial. (See § 911.6, subd. (c).) In contrast, appellants' opening brief says County denied the applications on May 1, 2018. The opening brief cites an unreliable document for this latter assertion. The problems surrounding that document are described later in this opinion.

Either way, County effectively denied the applications.

Shackelford, Justin Vanmeter, and Serena Guadarrama did not present a timely claim "because they passed away prior to the expiration of the time specified in Section 911.2 for the presentation of a claim." The petition also alleged that County suffered no prejudice from the delayed filing of appellants' claims.

At the hearing on the petition, both sides' counsel offered argument.[5] Appellants' counsel told the court that the traffic collision report placed blame for the collision on the driver of the decedents' vehicle, Nathan Finnell. Counsel further informed the court that the district attorney's office pursued "potential criminal charges" against Finnell "to the point that an arrest warrant was issued." Counsel said that Finnell "allegedly" said he was "getting away with the murder of three people." Finally, counsel related that Finnell pled no contest to three counts of vehicular manslaughter without gross negligence on November 7, 2017.

Counsel contended that County's negligence was not "legally established as the proximate cause of the deaths . . . until we could deal with whether there was a criminal act here and an intervening cause." Counsel argued it was reasonable for a plaintiff to wait for the conclusion of the criminal investigation on November 7, 2017, and only then "look about and say, okay, we're now going to look at who else may have been negligent in this case."

The court asked appellants' counsel what the claim against County was in this case, and counsel replied, "it's a bad intersection, it's failure to install traffic lights."

County argued that appellants' causes of action accrued on the date of the collision (Feb. 2, 2016) and therefore the last day to file a late claim was February 2, 2017.[6] (See § 911.4, subd. (b).)

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**5** There is no indication in the record that counsel were sworn to testify.

**6** At one point, the court asked respondent's counsel, "What about his [appellants' counsel's] argument that somehow it's tolled by virtue of the underlying criminal action against the driver?" Respondent's counsel began her response by saying, "Well, the

On July 2, 2018, the court issued an order denying appellants' petition. The court concluded appellants had provided no legal basis for tolling the deadline under section 911.4, subdivision (b).

## DISCUSSION

### I. Appellants Failed to Adduce Competent Evidence to Support Invocation of Discovery Rule

A. The Law

*1. Government Tort Claims Procedure and Deadlines*

With limited exceptions, section 945.4 prohibits the filing of certain "suit[s] for money or damages" against a public entity "until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board . . . ." (*Ibid*.) If the written claim relates to a cause of action for death or injury to a person, it must be presented to the public entity "not later than six months after the accrual of the cause of action." (§ 911.2, subd. (a).)

If the claimant misses the six-month deadline, they may apply to the public entity for leave to present a late claim. (§ 911.4, subd. (a).) Applications for leave to present a late claim have a deadline of their own. They must be presented to the public entity within a reasonable time "not to exceed one year after the accrual of the cause of action."

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County concedes that it is tolled . . . ." Appellants cite this opening phrase, suggesting County conceded their tolling argument was valid. However, after this opening phrase, respondent's counsel went on to discuss plaintiff Cruz's physical/mental incapacity. The full sentence reads: "Well, the County concedes that it is tolled, but in this specific instance, it's a little tricky because this – Mr. Cruz will essentially be, from what we understand, indefinitely incapacitated, so the time frame of when a claim should have been filed isn't necessarily clear for that type of individual." Counsel then immediately transitions to arguing why the *other* plaintiffs (i.e., appellants) are not entitled to relief. Thus, while the court's question and counsel's first words in response initially suggest a broad concession on the tolling issue that would apply to appellants, the remainder of counsel's response clarifies that it was in fact a limited concession only as to Mr. Cruz's incapacity.

(*Id*., subd. (b).) This deadline is jurisdictional. (*Lincoln Unified School Dist. v. Superior Court* (2020) 45 Cal.App.5th 1079, 1093.)

If the public entity denies, or fails to respond to, the application for leave to present a late claim, the claimant may petition the superior court for an order relieving the claimant from the claims filing requirement of section 945.4. (§ 946.6, subd. (a).) The petition must (1) show that the petitioner applied for leave to present a late claim, and the application was denied or deemed denied; (2) explain why the claim was not presented on time; and (3) provide information related to the claim as set forth in section 910. (§ 946.6, subd. (b).)

The court shall grant the relief requested in the petition if (1) the application to present a late claim was submitted within a reasonable time "not to exceed one year after the accrual of the cause of action" (§ 911.4, subd. (b)), and (2) one or more of the four circumstances described in section 946.6, subdivision (c)(1) through (4) are present. (§ 946.6, subd. (c).) The four circumstances are: (1) the failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect unless the public entity established that it would be prejudiced in the defense of the claim; (2) the person who sustained the alleged injury, damage, or loss was a minor during the entire six-month period following the accrual of the cause of action; (3) the person who sustained the alleged injury, damage, or loss was physically or mentally incapacitated during the entire six-month period following the accrual of the cause of action and the disability was the cause of the failure to present the claim; or (4) the person who sustained the alleged injury, damage, or loss died before the expiration of the six-month period following the accrual of the cause of action. (§ 946.6, subd. (c)(1)-(4).)

In ruling on the petition, the superior court must base its decision on "the petition, any affidavits in support of or in opposition to the petition, and any additional evidence received at the hearing on the petition." (§ 946.6, subd. (e).) Thus, the statutory scheme imposes an *evidentiary* burden on petitioners, which must be satisfied before the petition

may be granted. (*El Dorado Irrigation Dist. v. Superior Court* (1979) 98 Cal.App.3d 57, 62 (*El Dorado Irrigation Dist.*).) Petitioners must supply an evidentiary basis for the court to grant relief otherwise the grant of relief will be reversed on appeal. (See *id*. at pp. 62-63.) "Argument of counsel of course is not evidence." (*Id*. at p. 62.)

This petition to the superior court also has a deadline; it must be filed "within six months after" the application for leave to present a late claim was denied. (§ 946.6, subd. (b).) If this deadline is missed, " 'the court is without jurisdiction to grant relief under . . . section 946.6.' " (*Lincoln Unified School Dist. v. Superior Court, supra,* 45 Cal.App.5th at p. 1093.)

*2. Accrual of Causes of Action and the Discovery Rule*

Because the deadlines for filing a timely claim and for seeking leave to present a late claim are both based on the accrual of the underlying cause of action (see §§ 911.2, subd. (a), 911.4, subd. (b)), we address when causes of action "accrue."

Generally, "a cause of action accrues at 'the time when the cause of action is complete with all of its elements.' " (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 (*Fox*).) "An important exception to the general rule of accrual is the 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (*Id*. at p. 807.)

A plaintiff has "reason to discover" the cause of action if there is "reason to at least suspect that a type of wrongdoing has injured them." (*Fox, supra,* 35 Cal.4th at p. 807.) The plaintiff need not know the identity of the defendant, or even "the specific 'facts' necessary to establish the claim." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111, see *id*. at p. 1114.) All that is needed is a suspicion that someone has done something wrong to the victim. (*Id*. at pp. 1110-1111.)

B. Analysis

Respondent argues appellants' causes of action accrued on February 2, 2016 – the date of the collision. If true, appellants' applications for leave to present late claims on February 27, 2018, were filed over a year after the one-year *jurisdictional* deadline for submitting such an application had lapsed. (See § 911.4, subd. (b).)

In contrast, appellants argue their causes of action against County did not accrue until November 7, 2017, when Finnell pled no contest to the criminal charges arising out of the collision. Appellants argue that from the date of the collision (Feb. 2, 2016) to the date Finnell entered his plea (Nov. 7, 2017), "there was no reason for Appellants to suspect that there existed a dangerous condition or that it caused or contributed to their harm." Until that time, appellants say they were "rightly focused on the criminal actions of Mr. Finnell." "During the entire course of the criminal investigation into Mr. Finnell's actions, the question of a superseding cause, i.e., the unexpected and unforeseeable criminal and intentional act of another, remained unanswered." If, as appellants argue, their causes of action did not accrue until November 7, 2017, then the claims they presented to County on February 1, 2018, would arguably have been timely.[7]

While we are skeptical of appellants' invocation of the discovery rule here,[8] they actually face a more fundamental problem. Appellants presented no competent evidence to support the discovery rule.

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[7] Appellants also contend the trial court's order denying the petition failed to adequately address its delayed accrual claim. However, we do not review the trial court's reasoning. (See *Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 337.) We find the *ruling* to be correct as explained herein.

[8] "[I]n order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of *all potential* causes of that injury." (*Fox, supra*, 35 Cal.4th at p. 808, italics added.) To accept appellants' argument would be to hold that potential plaintiffs need only investigate one potential cause at a time. When a potential plaintiff suspects her injury may have resulted from some unknown form of wrongdoing, she

The unverified petition does not allege facts concerning the criminal proceedings against Finnell. Nor is any evidence concerning Finnell's criminal proceedings contained in counsel's declaration accompanying the petition. Instead, to establish the facts of their claim under the discovery rule, appellants rely on (1) counsel's argument at the hearing on the petition and (2) a document appearing in the record that was clearly prepared after the trial court ruled on the petition. We address each in turn.

First, counsel was not sworn in before offering his remarks and the record does not reflect that counsel offered any documentary evidence of the criminal proceedings at the hearing. In ruling on the petition, the court was limited to considering the petition itself, supporting or opposing affidavits and any additional *evidence* received at the hearing on the petition. (§ 946.6, subd. (e).) As previously stated, "[a]rgument of counsel of course is not evidence." (*El Dorado Irrigation Dist.*, *supra*, 98 Cal.App.3d at p. 62.)

Second, appellants rely heavily on a document in appellants' appendix captioned, "**APPEAL FROM DENIAL OF PETITION FOR ORDER RELIEVING PLAINTIFFS FROM SECTION 945.4 AND/OR LEAVE TO FILE ACTION AGAINST DEFENDANT COUNTY OF FRESNO [¶] **NOTICE OF PETITION AND PETITION FOR ORDER RELIEVING PLAINTIFFS FROM SECTION 945.4 AND/OR LEAVE TO FILE ACTION AGAINST DEFENDANT COUNTY OF FRESNO; MEMORANDUM OF POINTS AND AUTHORITIES (Government Code §946.6)****" This document has no file stamp, no signature, and is not dated. Moreover, the document itself references "the July 2, 2018 order of the Fresno County Superior Court denying Plaintiffs relief from Section 945.4 of the Government Code that

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"must go find the facts; she cannot wait for the facts to find her." (*Jolly v. Eli Lilly & Co.*, *supra*, 44 Cal.3d at p. 1111.)

was heard on June 27, 2018 . . . ." Therefore, it was clearly prepared after the trial court issued the order that is being challenged on appeal.[9]

We do not consider documents prepared after the trial court entered the order being appealed. Appellate courts review the correctness of a lower court's decision " 'as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.' " (*In re Zeth S*. (2003) 31 Cal.4th 396, 405.)

Even if this document had been submitted before the trial court made its ruling, it would not constitute competent evidence. The document was not signed, much less sworn under penalty of perjury. Argument of counsel in a memorandum of points and authorities is not evidence. (See *El Dorado Irrigation Dist.*, *supra*, 98 Cal.App.3d at p. 62.)[10]

There is "a complete lack of relevant and competent evidence to support the petition." (*Rodriguez v. County of Los Angeles, supra,* 171 Cal.App.3d at p. 176.) The trial court simply had "no evidentiary basis upon which to base [a] grant of the judicial relief requested." (*El Dorado Irrigation Dist.*, *supra*, 98 Cal.App.3d at p. 62.) The court did not err in denying appellants' petition.[11]

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**9** By including this document in the appendix, appellants represented to this court it is an accurate copy of a document in the superior court file. (Cal. Rules of Court, rule 8.124(g).) However, it appears unlikely this is an "accurate copy" of any document in the superior court file.

**10** Appellants also cite this document to convey information about the CHP's reports of the collision. The document is not competent evidence about the contents of the CHP reports for the same reasons described above.

**11** Given this conclusion, we do not address other arguments presented by the parties.

## DISPOSITION

The order denying the petition for relief from section 945.4 as to appellants is affirmed. Respondent County of Fresno is awarded costs on appeal.

DETJEN, Acting P.J.

WE CONCUR:

FRANSON, J.

PEÑA, J.